UNITED NATIONS

TD

United Nations Conference on Trade and Development

Distr.
GENERAL

TD/B/RBP/79/Add.1
23 October 1991

ENGLISH
Original: ENGLISH/FRENCH
RUSSIAN/SPANISH

TRADE AND DEVELOPMENT BOARD

Intergovernmental Group of Experts on
Restrictive Business Practices
Tenth session
Geneva, 21 October 1991

REVIEW OF THE OPERATION OF AND EXPERIENCE ARISING FROM THE APPLICATION AND IMPLEMENTATION OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

Replies by States and regional groupings on steps taken to meet their commitment to the Set of Principles and Rules

Note by the UNCTAD secretariat

CONTENTS

	Paragraphs
REPLIES FROM STATES	1 - 34
Côte d'Ivoire	2
Greece	3 - 4
Jamaica	5 - 8
Malta	9
New Zealand	10 - 11
Peru	12
Philippines	13
Sri Lanka	14 - 17
Thailand	18 - 21
United States of America	22 - 23
Union of Soviet Socialist Republics	24 - 32
St. Vincent and the Grenadines	33
Zaire	34

GE.91-51974

1. The information contained in this addendum was received after 9 July 1991, date of preparation of information contained in document TD/B/RBP/79 of 20 August 1991. The present note therefore contains replies received from thirteen countries, namely Côte d'Ivoire, Greece, Jamaica, Malta, New Zealand, Peru, Philippines, Sri Lanka, Thailand, United States of America, Union of Soviet Socialist Republics, St.Vincent and the Grenadines, and Zaïre.

COTE D'IVOIRE

[Original: FRENCH]

2. The Government of the Côte d'Ivoire stated that it had not elaborated new legislation to control restrictive business practices. However, within the framework of the programme of structural adjustment of the Côte d'Ivoire, the Government has decided on greater liberalization of its foreign commerce.

GREECE

3. The Government of Greece submitted its Annual Report on competition policy (1989) and stated that during the period under review there had been no legislative changes with regard to the Competition Act 703/77 "On the Control of Monopolies and Oligopolies and the Protection of Competition". The new market price regulation NO.14/89 that was introduced on 11 June 1989, implementing the objective of the free formation of prices, abolished a number of market price regulations which had proved to have negative effects on the product markets concerned . At the same time it codified in the new provisions all the existing market regulations for those 121 commodities and services which were still under price control. The prices of the above commodities were either being determined on a maximum basis, or were being formulated at the retail and wholesale level according to predetermined gross margins. As far as the free formation of the prices of these 121 basic commodities and services was concerned, this would be done gradually, depending on the competitive forces of the specific product market.

4. Given these facts and taking into consideration the need for the adjustment of the competition principles to the new conditions and requirements of the Greek economy within the perspective of the integration of the internal Common Market, the existing competition legislation is to be amended. The amendment will include provisions for the preventive control of mergers through an obligatory notification procedure, as well as provisions which will give authority to the Minister of Commerce to decide on the bloc exemption of certain categories of agreements (e.g. franchising, exclusive distribution agreements, etc) from the application of Act 703/77.

JAMAICA

5. The Government of Jamaica stated that, in keeping with Jamaica's policy of economic liberalization and transformation of the economy from a system which included State-owned enterprises and government control of some private sector prices to a market-driven and export-led economy, the Prime Minister appointed a Ministerial Sub-Committee in April 1990 to look at the question of competition policy as it relates to monopolies, restrictive business practices

and agreements and consumer unfairness practices. The Ministerial Sub-Committee appointed a Monopolies and Competition Technical Policy Committee to review the situation and make recommendations on the kind of competition legislation best suited to the needs of the country.

6. The Technical Policy Committee found that there was sufficient evidence of monopolistic and other restrictive practices to warrant the incorporation of new legislation and an institutional framework to prohibit agreements and practices which result in preventing, restricting and distorting competition in Jamaica. Specifically, four groups of practices were identified as deterrents to competition: restrictive business agreements and practices; consumer unfairness practices; mergers and misuse of dominant market positions; and interlocking directorates. As a result, on 9 April 1991, exactly one year after the appointment of the Committee, a Green Paper on the proposals for a Competition Act was tabled in Parliament.

7. One of the highlights of the Act is restrictive business practices. These include agreements - written or verbal - and actions which restrict, distort or prevent competition, including re-sale price maintenance. It is the effect of the agreement or practice on competition which will be considered and not merely behaviour. Certain actions and practices, however, are considered, on the face of it, to be anti-competitive and these will be the subject of prohibitions, viz:

(a) Horizontal price fixing, that is, the fixing of prices by firms at similar stages of the productive process;

(b) Re-sale price maintenance, as it relates to recommended prices; retailers should be free to make their own decision as to the prices at which they sell;

(c) The boycotting of customers or suppliers when not ensuring the achievement of legitimate business objectives such as quality, safety or environmental requirements. Situations entailing partial or complete refusal to deal with an enterprise on the customary commercial terms are identified under this heading, as are making the supply of a particular good or service dependent upon acceptance of restriction on manufacture of competing goods or services; also making the supply of a particular good or service dependent upon the purchase of another good or service from the supplier or his agent;

(d) The use by firms having substantial market power of such power for certain specified purposes, particularly, where the power adversely affects the ability of other firms to behave competitively; situations in which firms with market power exhibit predatory conduct as in the case of below-cost pricing to eliminate competition, discriminatory price-fixing terms or conditions of supply or purchase;

(e) Market sharing arrangements, consumer allocation, allocation by quota sales or production, collective action to enforce arrangements, concerted refusals to deal, and collective denial of access to an arrangemnt, or association which is crucial to competition;

(f) Collective tendering.

8. The final document would therefore be fashioned to make illegal all forms of competitor collaboration that have the effect of fixing prices, rigging bids, dividing markets, limiting output or otherwise eliminating competition among collaborators. All of these activities would be illegal, whether they derive from formal or informal arrangements. Notwithstanding the foregoing, the final document will have provisions to ensure that the arrangements that are found to be reasonable and do not severely affect competition would not be disturbed.

MALTA

9. The Government of Malta stated that the only existing legislation on the restriction of competition, is that found in Part I, sub-title III, of the Commercial Code entitled "Of Limits of Competition". The provisions of interest are Articles 32 to 37 (inclusive). These provisions were introduced into Malta's code prior to the existence of the "Set", and are therefore not influenced by the Set. The Attorney-General's Office can provide information concerning possible new legislation, especially in the light of Malta's application to join the EEC, and the declared policy of the Government to bring existing legislation into line with EEC regulations, which are very rigorous on the subject. If any revision is intended, this will be done in the light of EEC regulations and not on the basis of the "Set".

NEW ZEALAND

10. The Government of New Zealand submitted an annual report (1990/91) on restrictive business practices. It indicated that as a result of a review in 1988 and 1989, the Commerce Amendment Act 1990 made several significant amendments to the Commerce Act 1986.

11. The most significant change to the Commerce Act replaced the then mandatory merger pre-notification system with a voluntary pre-notification system, which came into effect on 1 January 1991. Under the new system, merger participants choose whether or not to seek the Commission's approval before proceeding. As a result, mergers that are not cleared or authorized by the Commission are no longer exempt from the restrictive trade practices provisions of the Set. This exposes mergers to a prohibition on agreements that substantially lessen competition. The amendment also provides for higher penalties and stronger enforcement provisions.

PERU

[Original: SPANISH]

12. The Government supplied the UNCTAD secretariat with its law entitled "Decreto Supremo No.296-90-EF", which aims at promoting free competition in production as well as commercialization of goods and services. The law prohibits acts which limit free competition. These are defined as those acts that derive from an abuse of a dominant position of market power, from monopolitic or monoponistic practices, distorting or impeding free competition. The law establishes the National Commission for the Defense of Free Competition, as an autonomous body, in charge of preventing,

investigating, correcting and sanctioning of practices contravening free competition. The Government will adopt further complementary rules, including details of administrative and economic sanctions to foster free competition.

PHILIPPINES

13. The Government of the Philippines stated that there are three bills pending in the Lower House of Congress that seek to establish a more comprehensive law for the purpose of protecting trade and commerce against unlawful restraints and monopolies. Meanwhile, there were no further developments on the implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in the Philippines.

SRI LANKA

14. The Government stated that it had further liberalized trade and encouraged foreign investments. In keeping with greater reliance on a market economy, Sections 23 to 26 of the Fair Trading Commission Act No. 01 of 1987 had been repealed by the provisions of the Industrial Promotion Act No. 46 of 1990, effective from 1 January 1991. Section 18 of the Fair Trading Commission Act had also been amended and only food items and pharmaceuticals could now be brought under price control. Items within this limit to be brought under price control depended on government policy. Thus at present wheat flour, bread and pharmaceuticals are under price control. A copy of the Industrial Promotion Act was sent to the UNCTAD secretariat.

15. Further amendments to the Fair Trading Commission Act were under consideration.

16. The Commission had corresponded with certain foreign agencies on the subject of dumping, as some products had been dumped in the Sri Lanka market in the past. The Commission was also undertaking a study with a view to recommending anti-dumping legislation to the Government in due course.

17. As regards technical assistance, and advisory and training programmes on RBPs, the Commission participated in the Fourth Conference on Anti-Trust Policies in Asian & Oceanian Countries, held in Wellington, New Zealand. At this conference it was agreed that RBP authorities in the Asian and Oceanian region should exchange information relating to RBPs more frequently and that the Fair Trade Commission of Japan was to function as co-ordinator.

THAILAND

18. The Government of Thailand stated that, over the past two decades, Thailand's trade policy had been moving towards free and fair competition. In its policy statement delivered to the National Legislative Assembly in April 1991, the present interim Government announced that it intended to promote

free and fair competition in trade and to curb monopolies. The essence of the government policy was summarized as follows:

(1) To create an environment that would be conducive to both domestic and foreign investment;

(2) To change the fundamental role of the government from "regulator and controller" to that of "supporter and promoter" in order to encourage the contribution of the private sector to the country's economy under the economic system of fair competition;

(3) To abolish regulations and rules that inhibited and restricted business expansion, except those that affected the country's economic security and public morality;

(4) To revise and improve laws and regulations that obstructed investment and business operations, through the deregulation of unnecessary official procedures.

Thailand's trade policy objectives

19. The Thai economy had undergone dramatic structural changes in the past two decades. From the mid 1970s onward, emphasis had shifted from import substitution to export-oriented industries, while manufacturing had began to overtake agriculture as the major contributor to the GDP.

20. Following the implementation of the export-oriented policy, Thailand's economic performance had become increasingly dependent on international trade. At present, external trade accounts for over 65 per cent of the GDP. The principal goals of the Thai trade policy in recent years have therefore been to prepare the country to play a greater role in international trade, to create a conducive environment for investment, to encourage a constructive and competitive economic structure and to liberalise both domestic and international trade by removing trade barriers and reducing trade-distortive effects to a minimum.

Domestic restrictive business practices

21. The Government was considering measures to curb domestic restrictive business practices. The Ministry of Commerce was responsible for the following matters:

(1) To eliminate or to reduce obstacles that may affect the price mechanism and the circulation of goods;

(2) To improve related rules, regulations and laws as an efficient mechanism in solving and minimizing problems and obstacles inherent in restricted businesses;

(3) To promote and support the free enterprise system with clear and transparent regulations on related matters for the benefit of planning in production and distribution.

The mechanism used to achieve the above-mentioned objectives is the Price Fixing and Anti-Monopoly Act, 1979, which is administered by the Ministry of Commerce.

21. Since the Act came into force in 1979, the Ministry of Commerce has only once exercised the power given by the Act concerning RBPs. This was in 1980 when the Ministry of Commerce brought ice manufacturing businesses under government control for two years until it was satisfied that no RBPs existed in the business. However, owing to the rapid expansion of the economy over the past decade, business operations have become much more complex, and the Price Fixing and Anti-Monopoly Act on 1979 was no longer sufficient to cope with the changed business practices. Thus, in early 1991, a working Committee was set up to look into the operation of the act and to recommend possible amendments. This Committee was given the following terms of reference:

(1) The Committee's activities covered basic goods, consumer products and services;

(2) The Committee's activities also entailed the identification of restrictive measures towards competition and the provision of new laws and regulations to supress such restrictions where they exist;

(3) The Committee was also responsible for amending the organization and penalties clause in line with normal business practice so that businessmen would no longer be regarded as criminals but rather wrongdoers in a business economic world. Under such circumstances, only a civil punishment would be invoked, with the exception of cases of conduct adversely affecting the country's economic, security or public interest.

The proposed amendment is scheduled to be submitted to the National Assembly in 1991. It will be seen that, although Thailand has not been very active in the supervision and control of RBPs in the past decade, efforts are being made by the Government to curb the abuse of monopoly powers and the use of RBPs in the Thai economy.

UNITED STATES OF AMERICA

22. The Government of the United States of America stated that on 16 November 1990, the Antitrust Amendments Act of 1990 amended the Sherman Act - the basic United States antitrust statute - to authorise courts to fine corporations up to $10 million (up from $1 million under previous law), and individuals up to $350,000 (up from $250,000) for each criminal violation of the Sherman Act; the Administration had asked Congress to pass such legislation. A copy of the amendment was sent to the UNCTAD secretariat.

23. In accordance with section F.4 of the Set, Department of Justice competition officials consulted with competition and other government officials from many countries during 1990 on competition policy issues. Department officials travelled to Brazil, Czechoslovakia, Hungary, Mexico, Poland, the USSR, and several OECD countries to discuss such issues, and also met in Washington with officials from Bulgaria, Czechoslovakia, Indonesia, Jamaica, Mexico, Morocco, Nigeria, Pakistan, Poland and the USSR for the same purpose. In addition, a Department official participated in the very successful UNCTAD seminar on competition policy held in Caracas, Venezuela, in September 1990.

UNION OF SOVIET SOCIALIST REPUBLICS

[Original: RUSSIAN]

24. The Government stated that the USSR antimonopoly legislation was in the process of elaboration. At present, there were some separate legislative acts and rules which regulated activities in this field pending adoption of the above mentioned legislation.

1. Measures of general economic significance

25. The Decree of the USSR Council of Ministers "Concerning measures on the Economy Demonopolization" dated 16 August 1990 is aimed at creating the prerequisites for transition to a vast utilization of market relations. It is aimed as well at shaping changes in economic mechanisms in the process of anti-monopoly-oriented reform. The Decree provides for basic principles of guidance for State authorities, amalgamations, enterprises and organizations in the field of prevention, restriction and nullification of monopolistic activity of participants in economic turnover, as follows:

(a) It is prohibited for participants in economic turnover, who dominate the market,

- to limit and stop production as well as to withdraw the goods from the trade turnover in order to create or support scarcity of the goods in the market, or in order to increase prices;

- to refuse to conclude transactions while they have real possibilities for production and selling the goods, or performance of work, or rendering services;

- to force partners to conclude disadvantageous contracts or contracts with terms and conditions which are not relevant to the subject of those contracts.

During the transitional period, participants in the economic turnover with a market share of more than 70 per cent, are considered as dominating the market. A differential treatment is applied to those participants of the economic turnover with shares of between 35 and 70 per cent. It is necessary to take into account in this case their real possibilities to affect seriously the general conditions of sale of goods, or performance of work, or of rendering services in the particular regional market;

(b) It is necessary to exclude possibilities for the creation of a dominating position or favourable conditions for the activity of particular participants in economic turnover, if such conditions prevent competition; it is also necessary to exclude the possibilities of concluding illegal transactions between participants in economic turnover which may hinder the normal functioning of the market and impair the interests of consumers - enterprises, organizations and citizens.

Transactions and individual actions of participants in economic turnover are to be considered illegal if they are aimed at dividing a market to limit competition, to exclude or limit access to the market

of other participants in economic turnover - sellers or buyers; decrease prices or not to change them for the purpose of unjustified high profit and removal from competition. However, such transactions or individual actions are admissible only if permission is granted by the proper antimonopoly authorities;

(c) It is prohibited to implement unfair competition in the form of:

- misleading consumers (buyers) concerning the denomination of a producer of the goods, his domicile, methods and mode of production, peculiar features and quality of the goods, as well as whether such goods are suitable for proper application;

- use of trade marks, firm denominations, marking (labelling) without permission of the participant in economic turnover, in the name of whom they are registered;

- unwarranted use or divulging of scientific, technical, production (know how) or commercial information.

In case of violation of the above principles, participants in economic turnover or authorites and their officials are to bear due responsibility.

Antimonopoly bodies, state arbitrators or courts are entitled to send in a legitimate manner orders stating cessation of violation or restoration of the primary situation, or binding to transfer unjustified profit to the state budget (i.e. All-Union, Republican or local) or change production structure, or break an enterprise into smaller units, or offset suffered losses.

26. In order to implement the State control of securing competition and limiting monopolistic activities, the USSR Antimonopoly Committee is to be established. It will be responsible, in particular, for:

- working out measures to secure competition and overcome monopolistic tendencies;

- implementing measures for demonopolization of production and trade turnover, establishment of small-sized enterprises, organizations and other units;

- summary analysis of the market and competition; expert evaluation of legislative acts regulating market activities;

- preparation of proposals in connection with the improvement of antimonopoly legislation, and of its application;

- studies of materials connected with establishment, reorganization and liquidation of large-sized participants in economic turnover, as well as in the of case of violation of the antimonopoly legislation, within the scope of its terms of reference;

- expert evaluation of big investment projects from the point of view of their possible monopolistic aspects.

Similar antimonopoly bodies may be set up in Republics of the USSR. The USSR Antimonopoly Committee will coordinate their activities on the basis of equal relations and mutual interests in the All-Union market.

27. A draft of the USSR Basic Law on Antimonopoly Activities is being worked out. It aims to provide the basic legal and organizational rules for securing competition as well as the measures to prevent, restrict and nullify monopolistic activities and unfair competition in the USSR economy. The Law will settle, in particular, prohibition of abuse of dominating position in the market, illegal transactions, unfair competition, discrimination against participants in economic turnover and impairment of their independence. Moreover, due attention will be paid to the State control for securing competition and restriction of monopolistsic activities as well as responsibility for violation of the antimonopoly legislation.

28. The draft Basic Law is currently being considered in the USSR Supreme Soviet (i.e. parliament).

2. Measures in the field of external economic relations

29. The USSR Council of Ministers Decree "Concerning further Development of External Economic Activities of State, Cooperative and other Collective Enterprises, Amalgamations and Organizations", dated 2 December 1988, stipulates that since 1 April 1989 all enterprises, amalgamations, producing cooperatives and other organizations, the products of which (work, services) are competitive in the foreign market, be entitled to carry out directly export and import operations.

30. The USSR Council of Ministers Decree "Concerning Measures on the State Regulation of External Economic Activities", dated 7 March 1989, entitles the State External Economic Commission of the USSR Council of Ministers, at the request of the USSR Ministry of External Economic Relations and Union Republics' Councils of Ministers, to suspend operations of participants in external economic relations when unfair competition takes place or when their activities injure the interests of the State.

31. The Decree of USSR Council of Ministers dated 16 August 1990 (see paragraph 25 above) provides for, in particular:.

- cessation of direct subordination of State external economic amalgamations with the USSR Ministry of External Economic Relations and their transformation into joint-stock companies and other organizational units with broader diversification of external economic activities;

- setting up, on a free-will basis, of miscellaneous external economic associations of a non-monopolistic nature in order to coordinate attempts to broaden the business activities of their participants in foreign markets and to prevent unfair competition by both Soviet and foreign participants in economic turnover;

- putting into effect the All-Union System of External Economic Information.

32. The USSR Cabinet of Ministers (i.e. a new denomination of the USSR Government) has entitled the USSR Ministry of External Economic Relations to conduct consultations with governmental bodies of other countries in connection with the implementation of the Set of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, for the purpose of control of such practices in the field of external economic relations. It is intended to set up an information system of restrictive business practices, and to elaborate measures which will keep participants in external economic relations informed of the Set of Principles and Rules, as well as of practices to control RBPs in other countries.

ST. VINCENT AND THE GRENADINES

33. The Government of St.Vincent and the Grenadines stated that, since no new legislation had been enacted on restrictive business practices, there was nothing to report on Government activities in the control of such practices. No studies had been carried out, and no guidelines or reports had been published on RBPs in the reporting period.

ZAIRE

[Original: FRENCH]

34. The Government of Zaire stated that, in practice, the Set of Principles and Rules constituted an important reference document for enterprises and made possible efficient and useful analysis.